Supreme Court, U. S.
FILED
NOV 4 1980
MICHAEL RODAK, JR., CLERK

No. 80-517

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

JUNEAU SQUARE CORP., et al.,

Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE et al.,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENT AETNA LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION

JAMES URDAN
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 277-5000
Attorney for Respondent
Aetna Life Insurance Company

Of Counsel:
WILLIAM A. STEARNS
QUARLES & BRADY
780 North Water Street
Milwaukee, Wisconsin 53202

QUESTION PRESENTED

Following the first trial of this case, the jury returned a verdict finding that defendant-respondent, Aetna Life Insurance Company, had not participated in an alleged conspiracy in violation of Section 1 of the Sherman Act. Although the trial court granted a new trial to the other defendants-respondents, who suffered an adverse verdict, it refused to set aside the verdict favorable to Aetna and denied petitioners' motion for a new trial against Aetna. Upon petitioners' eventual appeal, the Court of Appeals found no abuse of discretion by the trial court and affirmed the order.

It is the position of Aetna that none of the issues presented to this Court by the petition, even if determined favorably to the petitioners, would impair or affect the existing judgment in favor of Aetna. Therefore, in addition to the questions as framed in the petition, Aetna seeks consideration of the following question:

Regardless of how the Court otherwise disposes of the issues presented, should the petition be denied as to Aetna Life Insurance Company?

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STATEMENT OF THE CASE

Aetna Life Insurance Company, a defendant below and a respondent here, was charged with participation in a conspiracy in violation of Sections 1 and 2 of the Sherman Act. Having won a favorable verdict in the first trial of this action, Aetna did not participate in the second trial that was granted to the other respondents, First Wisconsin National Bank of Milwaukee, et al.

In this Court, Aetna relies on that verdict, on the order of the trial court denying petitioners a new trial against it, on the affirmance of that order by the Court of Appeals and on petitioners' failure in this Court to raise any issue respecting that order. No issue presented here would affect the validity of the

judgment that has been entered in favor of Aetna. Consequently, regardless of whether the Court grants any part of the petition as against any other respondent, it is the position of Aetna that the Court ought to deny the petition as it pertains to Aetna.

At the close of petitioners' case during the first trial, the trial court granted the motion of Aetna (and the other respondents) for a directed verdict on petitioners' Section 2 claims (Appendix for Petitioners 31). On the Section 1 claim, the jury found that Aetna Life Insurance Company had not participated in the alleged conspiracy, although it found liability and substantial damages against the other respondents. (App. 204).

Thus, the first judgment entered in this action, while otherwise favorable to petitioners, dismissed petitioners' claims against Aetna on the merits. (App. 209).

On motion of the other respondents at the end of the first trial, the trial court set aside the verdict (insofar as it was adverse to them) and judgment and granted them a new trial. Petitioners had moved for a new trial against Aetna contingent upon the trial court's granting a new trial to the other respondents. However, acting under F.R.C.P., Rule 59(a), the trial court refused to set aside that part of the verdict favorable to Aetna and denied petitioners' motion for a new trial. (App. 51 at 93-94).

Indeed, the trial court said that, if anything, Aetna Life Insurance Company had suffered from the same prejudice that caused it to grant a new trial to the other respondents. (App. 51 at 93-94). Consequently, Aetna played no part in the retrial of this action.

The second jury returned a verdict favorable to the other respondents, finding that there was no conspiracy in restraint of trade. (App. 248). Thus, the judgment from which petitioners appealed to the Court of Appeals dismissed their entire claim on the merits. (App. 252).

On appeal petitioners sought a third trial against all respondents. They claimed that the trial court had abused its discretion in denying their motion for a new trial against Aetna. Petitioners did not claim that the trial court had erred in the admission or exclusion of evidence or in its instructions pertinent to Aetna; rather, their position was that because the trial court set aside the verdict unfavorable to the other respondents it should have set aside the verdict favorable to Aetna as well. (App. 1 at 24-25).

The Court of Appeals found no abuse of discretion by the trial court and affirmed its order. It said that the question of Aetna's participation in the alleged conspiracy was separate from the question of participation by others, and it said that F.R.C.P., Rule 59(a) expressly permitted partial new trials under these circumstances. (App. 1 at 24-25).

Petitioners do not in their questions presented or points of argument raise any issue concerning the correctness of the trial court's order denying them a new trial against Aetna or the Court of Appeals' affirmance of that order.

REASONS FOR DENYING PETITION

Since petitioners do not seek review of the order denying their motion for a new trial against Aetna, that order is now final and the issue of Aetna's participation in the alleged Section 1 conspiracy cannot be relitigated. In addition, since petitioners' Section 2 claim against Aetna was based upon the same alleged conspiracy, relitigation of that issue is now precluded. It follows that none of the relief that petitioners might obtain upon review by the Court of the issues they present can be granted against Aetna Life Insurance Company.

For these reasons, regardless of how the Court otherwise disposes of the issues, the writ should be denied as to Aetna.

ARGUMENT

NONE OF THE RELIEF THAT PETITIONERS MIGHT OBTAIN IN THIS COURT CAN BE GRANTED AGAINST RESPONDENT AETNA LIFE INSURANCE COMPANY.

I. REINSTATEMENT OF THE FIRST VERDICT AND JUDGMENT WILL NOT BE ADVERSE TO AETNA.

The principal relief requested by the petitioners here is that the trial court's order granting a new trial to the other respondents be reversed and the verdict of the first jury reinstated. This issue is raised in their Questions Presented for Review 1-4 and 7 and in Points I and IV of their Argument.

Aetna has no interest in the outcome of this issue because the verdict of the first jury (the only verdict involving Aetna) was favorable, and any judgment would necessarily favor it.

II. A THIRD TRIAL OF PETITIONERS' SECTION 1 CLAIMS COULD NOT INVOLVE AETNA BECAUSE THE ORDER DENYING PETITIONERS A NEW TRIAL AGAINST AETNA IS NOW FINAL.

Petitioners' next hope is that the Court will find error in the second trial (in which Aetna did not participate) and grant petitioners a new, and third, trial. The issues upon which they rely are stated in Questions 5-7 and points of arguments II-IV.

Petitioners, however, can have a new trial only against the First Wisconsin respondents, not against Aetna. This conclusion necessarily follows from their failure to raise here for review the correctness of the trial court's refusal to set aside that part of the first jury's verdict finding that Aetna did not participate in the alleged conspiracy and the trial court's denial of petitioners' motion for a new trial against Aetna.

This issue was raised in the Court of Appeals as a part of petitioners' effort to obtain a third trial against all parties. The Court of Appeals rejected that argument. (App. 1 at 24-25). It found no abuse of discretion by the trial court in the application of F.R.C.P., Rule 59(a), which provides that the trial court may order a new trial as to "all or any of the parties . . . " . Relying on *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 84 L.Ed. 1129, 60 S.Ct. 811 (1940), it said that the question of participation in an alleged conspiracy by one party is separate from the question of participation by others, so that the grant of a new trial to some on that issue does not require a new trial as to all. Finally, the Court of Appeals agreed with the trial court that the verdict in favor of Aetna was "reinforced" by the factors that the trial court found prejudicial to all defendants, including Aetna. (App. 1 at 24-25).

Petitioners here raise no question concerning this order, nor is that question subsidiary to or fairly included in any question or argument made by petitioners. Rule 21.1(a), Rules of the Supreme Court of the United States (June 30, 1980). The Court will not consider questions that are not raised in the petition for certiorari. *Namet v. U.S.*, 373 U.S. 179, 10 L.Ed.2d 278, 83 S.Ct. 1151 (1963).

The question of a new trial on petitioners' Section 1 claims against Aetna is not before the Court; the order of the trial court, affirmed by the Court of Appeals, denying petitioners a new trial against Aetna is now final. Whatever the merit in petitioners' argument that they are entitled to a third trial on their Section 1 claim, they cannot have it against Aetna.

III. A NEW TRIAL OF PETITIONERS' SECTION 2 CLAIM AGAINST AETNA IS PRECLUDED BY THE JURY FINDING OF NO PARTICIPATION BY AETNA IN THE ALLEGED SECTION 1 CONSPIRACY.

In the trial court, petitioners levelled three Section 2 charges at respondents — monopolization, attempt to monop-

olize and conspiracy to monopolize. At the close of petitioners' case in the first trial, the Court directed a verdict against petitioners, primarily because they had failed to prove the market power of the alleged monopolist, respondent First Wisconsin Bank. (App. 31 at 42-50). That holding was affirmed by the Court of Appeals. In this Court, petitioners claim that the courts below applied the wrong test of market power and that they are entitled to a jury trial on the issue.

A jury trial on this issue cannot affect Aetna. Petitioners conceded at the time of the directed verdict motion that their monopolization and attempt to monopolize charges were aimed only at respondent First Wisconsin Bank. (App. 31 at 42). Against Aetna their claim was that its participation in the Section 1 conspiracy supported the charge that Aetna conspired toward the achievement of a monopoly by the First Wisconsin Bank. (App. 31 at 50).

The trial court correctly held that the Section 2 conspiracy charge against Aetna fell for failure of proof of the underlying monopoly charges against the First Wisconsin Bank. The Court of Appeals affirmed and gave as an additional reason (Footnote 17, App. 30) that the failure of petitioners to prove a conspiracy in restraint of trade precluded a finding of conspiracy to monopolize.

The Court of Appeals is correct. The jury verdict that Aetna did not participate in a conspiracy to restrain trade necessarily means that Aetna did not participate in any conspiracy to monopolize or to attempt to monopolize. Section 1 of the Sherman Act dealing with restraints of trade and Section 2 of the Sherman Act dealing with monopolies "overlap in the sense that a monopoly under Section 2 is a species of restraint of trade under Section 1". *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 226 n. 59, 84 L.Ed. 1129, 60 S.Ct. 811 (1940); *William Goldman Theatres v. Loew's, Inc.*, 150 F.2d 738, 740 (3rd Cir. 1945).

A monopoly is one kind of restraint of trade. "Any arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1." Areeda and Turner, *Antitrust Law* (1978), Vol. III, § 839, p. 358. A party that has not conspired to restrain trade cannot be found to have conspired to monopolize or to attempt to monopolize.

The claims of the petitioners against Aetna, whether arising under Section 1 or Section 2 of the Sherman Act, were all based upon the claim that Aetna had conspired with the other respondents. Thus, the jury verdict — now final — finding that Aetna did not participate in a conspiracy in restraint of trade likewise conclusively determines that Aetna did not participate in a conspiracy to monopolize or to attempt to monopolize. Relitigation of petitioners' conspiracy claim under Section 2 is therefore precluded just as their Section 1 claims are foreclosed. *Cromwell v. County of Sac,* 94 U.S. 351, 24 L.Ed. 195 (1877); *Partmar Corp. v. Paramount Theatres Corp.,* 347 U.S. 90, 95 L.Ed. 532, 74 S.Ct. 414 (1953). For this reason, a new trial on petitioners' Section 2 claim cannot be had against Aetna Life Insurance Company even if this Court were to order such a trial against the other respondents.

CONCLUSION

We disagree with petitioners' statement of the case, especially their attempts to recharacterize the facts in a fashion contrary to the finding of the jury. Petitioners had more than a fair chance to prove their claims against Aetna, and they lost. Both courts below declined to give them another chance, and petitioners here do not raise any issue that would impair the judgment in favor of Aetna.

There is no merit to the petition, and Aetna Life Insurance Company urges that the writ be denied. The other respondents will speak more fully to those issues. In any event, since no issue raised by the petition would entitle the petitioners to any relief

against Aetna, even if the petition is granted as to any issue or as to any other respondent, the petition should be denied as to Aetna.

October 29, 1980.

JAMES URDAN

Attorney for Respondent
Aetna Life Insurance Company

Of Counsel:

WILLIAM A. STEARNS
QUARLES & BRADY
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 277-5000